No. 201.
Reply Brf. of Childs & Hudson for D.C.
Filed Mar. 27, 1901.

Office Supreme Court U.S.
FILED
MAR 27 1901
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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THOMAS F. FARRELL ET AL., *Plaintiffs in Error,*
vs.
WEST CHICAGO PARK COMMISSIONERS, *Defendant in Error.*
} Error to the Supreme Court of the State of Illinois.

REPLY TO SECOND BRIEF OF PLAINTIFFS IN ERROR.

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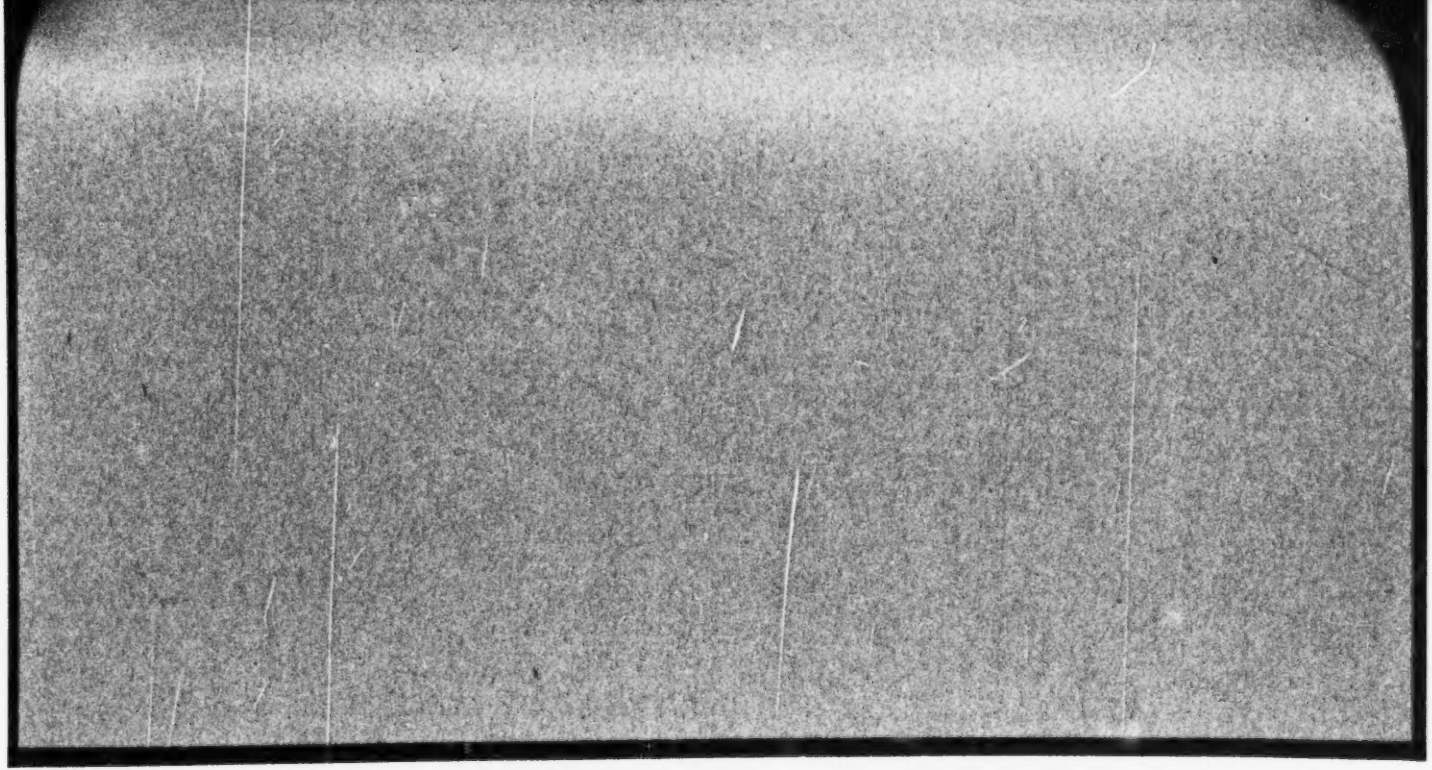
BARNARD & GILLAN PRINT., CHICAGO.



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Reply to Second Brief of Plaintiffs in Error.

At the argument of this cause the plaintiffs in error were given leave to file a second brief on the question of jurisdiction of this court, particular reference being made to the manner of raising the "federal questions" in the State Courts.

It appears (and counsel expressly admits it, reply brief, p. 27), that counsel has "extended" his brief "far beyond the boundaries originally intended."

I.

"IT IS ESSENTIAL TO THE JURISDICTION OF THIS COURT THAT IT SHALL APPEAR THAT ONE OF THE QUESTIONS MENTIONED IN THE ACT (SECTION 709 OF THE REVISED STATUTES OF THE UNITED STATES), MUST HAVE BEEN RAISED AND PRESENTED TO THE STATE COURT."

The foregoing is quoted from a most carefully considered opinion rendered by this court in 1875, in the case

of *Murdock* v. *Mayor, etc., of Memphis,* 87 U. S., 590. Its authority has never been questioned.

Among all the objections filed in the County Court of Cook County, and the assignments of error in the Illinois Supreme Court, there is but one place where any such federal question was *expressly* raised by the present plaintiffs in error, and that was in Objection 12, as follows:

12. "The statute under which the present proceedings are being conducted is contrary to the Constitution of the United States, and in conflict with Section 10 (first) of Article 1 thereof." (Pr. Rec., 19.)

Counsel now (and also at the oral argument), admit that "the reference to Section 10 of Article 1, contained in the foregoing objection, was inserted inadvertently." What he really depends on is the "due process of law" clause in the Fourteenth Amendment.

Chapin v. *Fye,* 179 U. S., 127, contains probably the latest expression of this court on the point in dispute. In that case the plaintiff in error moved for a new trial "on the ground (among others), that the statute in question was in violation of the 5th and 7th amendments of the Constitution, and repeated that contention in the assignments of error in the (Michigan) Supreme Court." That was held not sufficient to give the United States Supreme Court jurisdiction under the 14th amendment, the court saying:

> "If a party to an action in a State Court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare. * * * The 5th and 7th amendment were intended to operate solely on the Federal Government."

So although the plaintiff in error expressly invoked the United States Constitution, and although the part of that constitution invoked contained the same phrase, "due process of law," as the 14th amendment, yet because that particular paragraph limited the rights of the Federal Courts, and not the State Courts, it was held that the plaintiff in error had not properly presented the question he really intended to argue.

In the case at bar the plaintiffs in error were even wider of the mark—they mentioned the *"ex post facto"* clause of the *constitution,* and now base their argument on the "due process of law" clause of the amendment.

Counsel seek to avoid the objection that he has not *expressly* raised the question which he now seeks to argue, by alleging that it is sufficient that the question be *decided* (not raised), by necessary implication. The fallacy of the argument will be seen if it is analyzed and presented in the form of a syllogism, thus:

(1) "The Supreme Court of Illinois, by its decision, confirmed the assessment."

(2) "Such confirmation would be wrong if it deprived these objectors of their property without due process of law."

(3) "Therefore the decision of the Illinois Supreme Court, in effect, decided that the assessment did NOT deprive them of property without due process of law."

(4) "The Illinois Court having *passed* upon that Federal Question, it follows that this court has jurisdiction to review that decision."

The fallacy of the above argument is apparent without further comment. It results from confusing a case where

the validity of a statute *was* drawn in question, and a case where such validity *might* have been drawn in question, *but was not.* If, in this case, where there was no *express* objection on the ground that there was not due process of law, that matter is nevertheless "drawn in question," it follows that the same matter is always "drawn in question" by the same kind of "necessary implication" whenever a judgment is rendered against any person requiring the payment of money; and it would not matter whether he appeared and defended or allowed the suit to go by default. Under such a construction of Section 709 of the Judiciary act, the United States Supreme Court would soon be flooded with appeals in cases where the State Courts in *fact* never imagined they were deciding any federal question whatever.

The only other way counsel seeks to justify this absence of an express objection covering this constitutional point, is the following:

"The 9th objection found on page 11 of the printed record, states that the act under which the petition is filed, approved June 24th, 1895, is not in accordance with the Constitution of the State of Illinois, and is, therefore, void."

"The Constitution of the State of Illinois contains a provision similar to the provision which is a part of the Fourteenth Amendment to the Constitution of the United States."

"Conclusion: Therefore the said Act of 1895, is also contrary to the said provision of the Fourteenth Amendment, and the question was properly raised below."

The quotations are from reply brief; the conclusion is not expressed in exactly the above form, but the sub-

stance is the same. What counsel really says is: "It will be seen that the above provision of the Constitution of Illinois and the Fourteenth Amendment are substantially in the same language, and we feel justified in asking Your Honorable Court to apply the rule which seems to be laid down in the case of *Spencer* v. *Merchant, supra.*"

It would be a similar argument to say that:

"The A. B. & C. Railroad runs parallel with the D. E. & F. Road."

"I have bought a ticket over the A. B. & C. Railroad."

"Therefore I am entitled to ride over the D. E. & F. Road," which is absurd.

But the question is not a new one in this court.

In *Kipley* v. *Illinois,* 170 U. S., 182, A. D. 1897, the same argument was made, but did not avail. The court said:

> "We are of the opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois civil service act is "unconstitutional and void," but * * * our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a *Federal* Right. The averment that the statute of Illinois was unconstitutional and void must be taken as intended to apply to the constitution of that state, and not to the Constitution of the United States."

Moreover, in each of the cases cited by counsel for the plaintiffs in error on this point, it appears that the Federal question was expressly raised.

Thus in *Murray* v. *Charleston*, 96 U. S., 432, it appears that "one of the grounds of the notice of the appeal was 'that such a tax is a violation of good faith in the contract of loan, impairs the obligation of said contract, and is, therefore, unconstitutional and void.' It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State, a federal question was presented by the pleadings and was decided."

In *Furman* v. *Nichols*, 8 Wall., 44, the court said:

> "The proceeding was an effort on the part of the plaintiff in error to test the question of the validity of the authority of a public officer of the state, exercising authority under the state, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a state to pass any law impairing the obligation of contracts. It is alleged that Furman is the owner of the notes and entitled to have them received for taxes; that he had tendered them to the defendant, who had refused them, and that it was not in the power of the legislature to impair the validity of this contract."

In the case at bar there was no mention, in any objection, that there was any lack of "due process of law."

In *Spencer* v. *Marchant*, 125 U. S., 345, the court said:

> "He (the plaintiff in error), contended that the statute of 1881, was unconstitutional and void because it was an attempt by the legislature to validate a void assessment *without giving the owners of the lands an opportunity to be heard upon* the whole amount of the assessment. Thus he directly and in apt words presented the question whether he had been unconstitutionally deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

In *Chicago Life Ins. Co.* v. *Needles,* 113 U. S., 574, the court says:

> "At the final hearing it (the plaintiff in error) moved the court upon written grounds for a final decree in its behalf, one of which was that the statutes of the state under which the proceedings were had were in violation of the Constitution of the United States in that they *impaired the obligation* of contract between the state and the company, and its policy holders and creditors."

The appeal was not dismissed, but the judgment was affirmed.

The only place where *Murray* v. *Charleston* is cited in support of the proposition that the federal question need not be *expressly* raised in the State Courts, is in the *dissenting* opinion of the late Justice FIELD, in *O'Neill* v. *Vermont,* 144 U. S., 323. In no case has the doctrine ever prevailed that the United States Supreme Court would reverse a State Court on a question which was not expressly *raised* before it. It is not necessary that the *opinion* of the State Court should expressly mention the Federal Question, but the record must show that the matter was actually "drawn in question."

In the case at bar the federal questions which plaintiffs in error now seek to raise were NOT drawn in question in the State Courts, and the State Courts did not have their attention drawn to the points, but they are now raised for the first time.

II.

There is an inconsistency between a point made in the original brief of plaintiffs in error, and a statement in their reply brief which may be of some interest to the court.

At page 18 of the original brief, counsel states: "The original proceeding having failed, the defendant in error herein instituted a new assessment for the purpose of obtaining the cost of the improvement previously constructed, by imposing a charge therefor AGAINST THE ABUTTING AND CONTIGUOUS PROPERTY. This we contend is in conflict with the Constitution of the United States." Citing *Norwood* v. *Baker,* 172 U. S., 269.

In their reply briefs (page, 18), however, they say: "The contention is that the *first* assessment was confined to contiguous property, while the *present* assessment is against all property benefited. For this reason we claim that the present proceedings are contrary to law."

Thus it will be seen that in their first brief they objected that the assessment *was* on frontage only, while in the reply brief they object that it is *not* on frontage only. The real fact of the matter is, that it makes no difference to them how the others are assessed so long as they were not assessed a *greater amount* than they were benefited, nor an *undue proportion* of the total cost; and both of those questions were *left to the jury,* and were determined adversely to the plaintiffs in error.

In fact counsel states in his reply brief: "We will admit that we would not be prejudiced by a new assessment roll covering a larger district, by which other property-owners are made to contribute to the expense."

III.

"THE CERTIFICATE OF THE CHIEF JUSTICE OF THE STATE COURT ALLOWING THE WRIT OF ERROR, THAT A FEDERAL QUESTION AROSE AND WAS DECIDED AGAINST THE PLAINTIFFS IN ERROR, CANNOT SUPPLY THE WANT OF ALL EVIDENCE TO THAT EFFECT IN THE RECORD."

Felix v. *Schwarenweber,* 125 U. S., 54.
Cal. Powder Wks. v. *Davis,* 151 U. S., 393.
Powell v. *Brunswick Co.,* 150 U. S., 433.

In the case at bar the plaintiffs in error quote at length from the petition for writ of error, and from the order entered thereon by the chief justice of the Illinois Supreme Court, to establish thereby that a federal question was raised and decided adversely to them.

The order merely allowed a writ of error. It did not certify that a federal question was involved.

In the case of *Powell* v. *Brunswick,* last above cited, this court said:

> "While the certificate of the presiding judge of the State Court * * * is always regarded with respect, it cannot confer jurisdiction on this court to re-examine the judgment below."

In *Felix* v. *Schwarenweber,* 125 U. S., 54, this court said:

> "When counsel applying for the allowance of a writ of error insist that a federal question has been decided against the plaintiff in error, the Chief Justice of the State Court may feel bound to allow the writ for the purpose of submitting to the final determination of this court whether such a question was necessarily involved in the judgment sought to be reviewed. But his certificate that such a question arose and was decided against the plaintiff in error

> cannot supply the want of all evidence to that effect in the record."

In the case at bar there is no such certificate.

In *California Powder Works* v. *Davis,* 151 U. S., 389, this court says:

> "We cannot find that the title or right referred to in argument was specially set up or claimed prior to its assertion in the petition for the writ of error, which forms no part of the record of the court below."

The writ of error was, therefore, dismissed.

It will, therefore, be seen that, without showing any disrespect to the order of the chief justice of Illinois, this court will refuse to look to that order or to the petition on which it was based to ascertain whether it now has jurisdiction by reason of a federal question being properly raised, in apt time, in the State Courts.

IV.

We believe that no "federal question" was properly raised below; that the invoking of the 14th amendment was an afterthought, and that the real reason for taking a writ of error to this court was that Messrs. Lombard, Cummings *et al.,* had taken their case to this court (No. 160, this term), and the present plaintiffs in error merely attempted to follow in their footsteps without having made suitable preparations for the journey.

We still believe that our motion to dismiss should prevail.

Respectfully submitted.

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CHARLES HUDSON,
Counsel for Defendant in Error.